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No. 07-1501

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IN THE

Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC., AND
GENERAL ELECTRIC CAPITAL CORPORATION,
Petitioners,

v.

NEWCAL INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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IKON respectfully submits this supplemental brief in light of the Court's June 8, 2009 decision in *Boyle* v. *United States*, No. 07-1309.[1] As discussed below, the Court should grant certiorari on Questions 1, 2, and 4 of IKON's petition for certiorari, and should postpone disposition of Question 3 until after it has resolved those other questions.

[1] As in the petition for certiorari, "IKON" refers to both petitioners, and "NewCal" refers to all respondents.

DISCUSSION

Among the four questions presented in this petition, Question 3 relates to pleading and proof requirements for allegations of RICO associations-in-fact in civil cases. That question is similar to the one just decided in *Boyle*, which concerns jury instructions in criminal RICO cases. It appears that this petition, filed on May 28, 2008, has been held pending disposition of *Boyle*.

In its June 8, 2009 opinion in *Boyle*, the Court upheld jury instructions that did not explicitly require the jury to find, as a precondition of guilt, that an alleged RICO association-in-fact had "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages." *Boyle*, slip op., at 1 (internal quotation marks omitted). But the Court reaffirmed that, to qualify as an "enterprise," an alleged association-in-fact "must have a structure," *id.* at 6, and must be "a continuing unit that functions with a common purpose," *id.* at 9.

Under these standards, as clarified in *Boyle*, NewCal's RICO claims should still be dismissed because NewCal has never pleaded a coherent RICO "enterprise" with any type of meaningful "structure." *See* Pet. 28. Nonetheless, the proper application of *Boyle* to the facts of this case is a question for the lower courts to address in the first instance on remand, and thus we do not now seek this Court's plenary review of Question 3.

We do, however, seek this Court's review of Questions 1, 2, and 4, each of which is logically unrelated to Question 3. Question 1 addresses NewCal's antitrust claims not its RICO claims, and poses a key issue of antitrust market definition that has emerged in the wake

of this Court's decision in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992). As we have discussed, all courts of appeals that have addressed the issue, except for the Ninth Circuit, have given *Kodak* an appropriately narrow interpretation and would have ordered dismissal of the antitrust claims here, which purport to limit the relevant market solely to customers under contract with IKON. *See* Pet. 15-20. In contrast, the Ninth Circuit preserved respondents' antitrust claims only because it, and it alone, has given *Kodak* a radically broad interpretation that *Kodak* cannot begin to bear. *See, e.g.*, Cert. Reply 5-6. That circuit conflict warrants this Court's prompt resolution, and it is unaffected by *Boyle*, which relates neither to antitrust nor to issues of market definition.

Question 2 does involve NewCal's RICO claims, but it addresses an issue unrelated to *Boyle* and antecedent to Question 3: the Ninth Circuit's disregard of the proximate-cause standard established in *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006).[2] *Anza* compels dismissal of any RICO claim brought by plaintiffs who seek to "circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Id.* at 460. As discussed in our petition (at 24-27) and reply brief (at 7-9), plaintiffs allege nothing more than that here, and their RICO claims therefore fail *Anza's* proximate-cause requirement. If this Court reverses the Ninth Circuit on that ground, the RICO claims would disappear from the case, and neither this Court

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[2] As we have discussed, the Ninth Circuit's treatment of the *Anza* issue is an appropriate candidate for summary reversal. *See* Cert. Reply 9.

nor the Ninth Circuit would ever need to reach the unrelated *Boyle* question presented in Question 3.

Finally, Question 4 addresses the Ninth Circuit's untenable conclusion that the Declaratory Judgment Act permits abrogation of IKON's contracts with thousands of non-parties to this suit, thereby subverting the class-action mechanisms of Rule 23. *See* Pet. 31-33. That issue, too, is logically unrelated to *Boyle* and Question 3 in this petition.

In sum, this Court should grant certiorari on Questions 1, 2, and 4 in the petition, and defer disposition of Question 3 until after it has resolved the remainder of the case. Alternatively, if the Court does not grant plenary review of any question presented here, it should either (i) summarily reverse the Ninth Circuit on Question 2 in light of *Anza* and remand with instructions to dismiss the RICO claims or (ii) grant certiorari on Question 3, vacate the decision below, and remand for further proceedings in light of *Boyle*.

CONCLUSION

The Court should grant certiorari on Questions 1, 2, and 4 of its petition, and should postpone disposition of Question 3 until after it has resolved those other questions.

Respectfully submitted.

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